

MEMORANDUM

TO: The Honorable Donald W. Lemons
Chief Justice, Supreme Court of Virginia
dlemons@vacourts.gov

FROM: David B. Franzén
Presiding Judge, Circuit Court, Madison County, VA
dfranzen@vacourts.gov

DATE: December 11, 2020

RE: Resuming Jury Trials - REVISED PLAN

I. Introduction

This revised memorandum is submitted pursuant to The Sixth Order Extending Declaration of Judicial Emergency (“Sixth Order”) entered by the Supreme Court of Virginia on June 22, 2020 and pursuant to the attachment to the November 30, 2020 email from Edward M. Macon, Assistant Executive Secretary and Counsel, Office of the Executive Secretary, Supreme Court of Virginia. I have attempted to address the deficiencies of my prior proposal which deficiencies are set forth in that attachment.

I believe that jury trials in Madison County can resume within thirty (30) days from the date of approval of this Revised Plan. However, the most recent information from the Rappahannock Rapidan Health District demonstrates that this County can expect to experience an increase of COVID cases. Therefore, this projected time frame is subject to adjustment, in consultation with the local Health Department officials.

II. Stakeholders

The cover memorandum accompanying the June 29, 2020 Guidance and Considerations for the Resumption of Jury Trials (“Guidance and Considerations”) from Chief Justice Donald Lemons and Karl Hade, Executive Secretary, Supreme Court of Virginia, as well as the Sixth Order, requires consultation with certain stakeholders in the preparation of that plan. I identified the following stakeholders:

1. The Commonwealth’s Attorney;
2. The Clerk of the Circuit Court;
3. The Sheriff;
4. The primary courtroom bailiffs;
5. Representatives of the local Bar
6. The Chief Probation Officer; and
7. The primary criminal court reporter.

I held an initial meeting of the stakeholders on July 22, 2020. I received written input from those stakeholders and thereafter disseminated that input and convened a second meeting of

stakeholders to discuss their input on August 5 and submitted the resulting plan via the Chief Judge, 16th Judicial Circuit, on August 11, 2020. Following receipt of Mr. Macon's November 30, 2020 email and attachment I again conferred with some of the identified stakeholders.

III. Resources

Resources

The following resources were utilized in the preparation of this memorandum:

1. [The Governor's Executive Order 63 \(2020\)](#);
2. [The Supreme Court's First through Fourteenth Judicial Emergency Orders](#);
3. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>;
4. [Vimeo.com/426265829](https://www.youtube.com/watch?v=426265829) (National Center for State Courts webinar on "Reestablishing Jury Pools in the COVID-19 Era");
5. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>;
6. https://www.ncsc.org/_data/assets/pdf_file/0015/34314/Considerations-in-Resuming-Court-Operations.pdf;
7. <https://www.cdc.gov/coronavirus/2019-ncov/communication/print-resources.html?Sort=Date%3A%3Adesc>;
8. <https://www.epa.gov/pesticide-registration/list-n-disinfectants-coronavirus-covid-19>;
9. <https://www.cdc.gov/handwashing/index.html>;
10. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/gloves.html>;
11. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>;
12. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html> (face shields as alternative to cloth face coverings); see language quoted, Guidance and Considerations, IV.A.iv.1.(b)(i));
13. https://www.ashrae.org/file%20library/about/position%20documents/pd_infectiousaerosols_2020.pdf;
14. <https://www.vdh.virginia.gov/content/uploads/sites/182/2020/06/Employee-Screening.pdf>;
15. www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection;
16. <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>;
17. <https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html>;
18. [VDH Interim Guidance for Daily COVID-19 Screening of Patrons and sources cited therein including the COVID-19 Screening Protocol; Survey for Patrons](#);
19. "Common Issues" attached to July 29, 2020 email from Sharon Abernathy to Chief Circuit Court Judges;
20. The Governor's Sixth Amended Executive Order Number Sixty – Seven (2020);

21. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>;
22. November 13, 2020 News Release announcing Governor’s Statewide Measures to Control COVID-19; and
23. [§16VAC25-220](#) Emergency Temporary Standard – Infectious Disease Prevention and Guidance for Employers and Employees by the Virginia Department of Labor and industry promulgated thereunder.

IV. Jury Summonses

- A. The Clerk will summons twice the number of potential jurors than has been the practice in the past;
- B. The summonses will contain information regarding “high-risk” individuals, will require those summoned to self-identify symptoms, and will require the persons summoned to walk through the CDC self-checker:
 - a. “High Risk Questions” to be included in the summonses – see III, 5 and 21, above:
 - i. Do you have a condition that makes you at higher risk for the COVID-19 virus? (Such as high blood pressure, chronic lung disease, diabetes, obesity, asthma, liver disease, severe obesity, chronic kidney disease, heart conditions, etc.)
 - ii. Are you over the age of 65?
 - iii. Do you care for someone who is at higher risk?
 - iv. Do high-risk people live in your household?
 - v. Are you a sole caretaker?
 - vi. Is childcare available?
 - vii. Do you interact with high-risk people for work? Do you work in a long-term care facility or other healthcare environment?
 - b. Self-checker, list of symptoms, screening questions - “Screening Questions” to be included in the summonses – see III, 3 and 18, above):
 - viii. Within the last 14 days have you traveled internationally?
 - ix. Are you currently experiencing, or have you experienced in the past 14 days, a fever, cough or shortness of breath?
 - x. Within 14 days of the trial date have you had (or do you have):
 - xi. Fever or chills?
 - xii. Cough?
 - xiii. Shortness of breath or difficulty breathing (other than a pre-existing non-COVID diagnosis)?
 - xiv. Fatigue?
 - xv. Muscle or body aches?
 - xvi. Headache?
 - xvii. New loss of taste or smell?
 - xviii. Sore throat?
 - xix. Congestion or runny nose?

- xx. Nausea or vomiting?
 - xxi. Diarrhea?
 - xxii. In the past 14 days, have you been in close proximity to anyone who was experiencing any of the above listed symptoms?
 - xxiii. In the past 14 days, have you been directed to quarantine, isolate, or self-monitor?
 - xxiv. In the past 14 days, have you been diagnosed with, or had contact with anyone who has been diagnosed with COVID-19 or resided with someone in the above categories?
 - xxv. Have you been tested for COVID-19 and are waiting to receive test results?
- c. The summonses will indicate that if someone responds “yes” to the above listed Screening Questions, they will be denied entry to the courthouse.
- C. The summonses will contain information regarding efforts to minimize the spread of COVID, including the requirement to mask when entering the courthouse, mandatory questions to be asked at door (Screening Questions), the wearing of face shields once the jury is selected, the fact that temperatures will be taken prior to entering the courthouse and twice each day; and the sanitizing efforts which will be employed during trial;
 - D. The summonses will also contain information regarding mandatory six-foot distancing at all times, and periodic handwashing required of all participants during trial;
 - E. The summonses will inform those persons summoned to report to the on-duty deputy at the Main Street public entrance to the courthouse at a time specific, to answer the Screening Questions, to have their temperature taken, and to provide their name and cell number to the deputy. They will be informed that at that point that they will be instructed to return to their car until they receive a call/text message to report to the third-floor courtroom, where they will receive further instructions;
 - F. The Court will defer from service those who self-identify as high-risk; potential jurors will not be allowed to simply self-select out of jury duty during the COVID pandemic; and
 - G. Persons summoned who do not appear will be required to show cause why they should not be held in contempt; however, reasonable explanations, supported by facts, regarding COVID concerns (exceptional to the individual) will be liberally accepted;

V. Venire Panels

- A. The court will consider the possibility of requiring jury selection the day before trial, if seating a jury is expected to be difficult, for example, in very high-profile cases;
- B. All *venire* persons shall report at staggered times (e.g. 8:30 a.m., 8:40 a.m. and so on);
- C. They will report to the Main Street public entrance, answer the High Risk Questions and the Screening Questions (III.3, 5, 15) and have their temperatures taken; they will be provided with masks if they did not bring their own; they will then provide their names and cell numbers to the deputy and return to their vehicles;

- D. Panels will be called in groups of 10; bailiffs will text the first group, who will be escorted by a deputy to the courtroom; once that group proceeds, the next group of 10 will be texted to appear at the Main Street public entrance;
- E. There is only one Main Street public entrance to the building; one-way traffic will be enforced in all movement throughout the courthouse; only when the persons (socially distanced) have cleared in one direction will socially distanced traffic in the opposite direction be permitted;
- E. The first panel will be seated in the gallery, ensuring social distancing (the gallery is sufficiently large to so accommodate a panel of 10, plus one or two members of the public, plus one or two members of the media) for *voir dire*;
- F. The courtroom will have plexiglass panels installed in front of the bench; the defendant will be seated at counsel table, and will wear a face shield (described below) so that the *venire* may see the defendant;
- G. Those *venire* not stricken for cause will be moved to the jury box, ensuring social distancing; their seats will be pre-assigned by a label ensuring appropriate distancing; the jury box will be enlarged so that some of the jurors will sit outside the box but in full view and hearing of all of the proceedings; other *venire* not stricken for cause will remain in the gallery until there are sufficient jurors to commence preemptory strikes and have a full panel plus two or three alternates (at a minimum);
- I. When a full jury (depending on criminal – felony or criminal – or civil) is selected; they will be all seated in the enlarged jury area and arranged so that they are socially distanced, and each juror has the same approximate view of the proceedings;
- K. Persons permitted in the courtroom for trial will be limited to:

- 1. Judge;
- 2. Jurors;
- 3. Clerk(s);
- 4. Court reporter;
- 5. Counsel;
- 6. Parties;
- 7. Victim;
- 8. The witness on the stand;
- 9. Any permissible expert witness(es);
- 10. Courtroom security;

11. IT personnel necessary to live-stream proceedings to the Juvenile and Domestic Relations District courtroom which will be made available for the public and media and as otherwise needed; and

12. Limited press/observers as social distancing permits.

VI. Trial

- A. The remaining discussion is equally applicable to criminal and civil juries of any size;
- B. To the extent possible, jury trials will be scheduled on dates when the Juvenile and Domestic Relations and General District Courts do not sit; if the JDR court is sitting, to the extent practicable, it will be asked to relocate across the street to the GDC courtroom;
- C. Air filters in the courthouse will be changed twice as frequently;
- D. Weather permitting, fans will be set up venting and circulating air from the courtroom through the portico, outside;
- E. The location of all participants will be recorded to facilitate contact tracing;
- F. The Madison courthouse is not typically crowded; it is anticipated that social distancing can be maintained by court security with reasonable diligence; all courtroom proceedings will be live-streamed to the Juvenile and Domestic Relations District courtroom for the public and media;
- G. There will be signs posted throughout the courthouse requiring masks, social hygiene and handwashing; sanitizer dispensers will be located on each floor, at the top and bottom of the stairs and at the entrance to each service area;
- H. Co-counsel will be appointed in indigent criminal trials to avoid mistrials in the event one attorney becomes ill or experiences COVID symptoms; the Commonwealth will be required to have at least two attorneys participate for multi-day jury trials; in civil matters counsel will be admonished to have co-counsel since the court will not hesitate to continue a civil matter indefinitely if counsel falls ill;
- I. There will be hand sanitizer dispensers located at each counsel table, in the witness box, at intervals at juror seats, on the bench, and in each witness room (there are numerous witness rooms throughout the courthouse enabling social distancing and appropriate separation of witnesses); there will also be canisters of sanitizer wipes similarly located;
- J. Counsel tables will be shifted if necessary to maximize communication with the jury and at least six feet from any juror, maintain social distancing, and argument to the judge; plexiglass panels will be installed in front of the bench; so long as social distancing is observed counsel may be permitted to remove masks occasionally to facilitate communication, or may be permitted to wear a face shield;
- K. Each juror will exchange their mask for a face shield; the defendant should be able to see the jurors, unless good cause exists to obscure a juror's identity or reaction to the presentation of evidence or argument;

All persons, including without limitation, jurors, counsel, parties, witnesses, court security and other personnel must wear face coverings. The judge, clerk and court reporter, however, will have large plexiglass screens placed in front of them and will be at least six feet from any other courtroom participant. Therefore, once those individuals have entered the courtroom wearing masks they will be

permitted to remove face coverings. The witness stand, however, is sufficiently distanced from any other person in the courtroom to allow the witness to take the face covering down and testify with face exposed, unless the court requires the continued use of face coverings. If a lawyer or bailiff needs to approach a witness to hand him something, the Court will instruct the witness to recover his or her face covering before allowing the approach.

If face coverings impair the ability of a lawyer to communicate with the witness or with the Court, the Court may grant the attorney permission to remove his or her face covering as necessary, ensuring that the attorney remains physically distant from other persons in the courtroom.

A criminal defendant may be asked to remove his face covering during voir dire to ensure that prospective jurors can see him and indicate whether any know him or recognize him. He may also be asked to lower his face covering briefly for the purpose of enabling a witness to see his face and answer whether the witness can identify the defendant.

If face coverings impair the ability of a lawyer and his client to communicate at counsel table (and alternate methods of communication such as note-writing, texting between devices, etc., are unavailable or insufficient), **the Court will permit counsel whatever recesses are necessary for the purpose of facilitating private communication. The Court expects counsel to maintain social distancing with co-counsel and his or her client at all times.** There are a sufficient number of conference rooms in the courthouse, which rooms are of a sufficient size, to accommodate such socially distanced meetings;

Jurors will wear face coverings at all times, but the Court expects to permit individual jurors to lower the cover briefly if requested by counsel, while ensuring proper social distancing of at least 10-feet from all other persons.

Sidebars may be conducted at the bench, with a plexiglass shield separating the judge from the lawyers, or alternatively in the jury deliberation room immediately behind the courtroom. Alternatively, if the sidebar is

expected to be lengthy, lawyers may remain at counsel tables while the jury retires to the jury room.

If a face covering must be removed for any reason (voir dire, identification, etc.), the distance between that person and all others should be more than 10 feet, as recommended by the Virginia Department of Health.

Face shields:

- i. The court will use face shields which shall comply with the guidance from the CDC found at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html#face-shields>:
- ii. “A face shield is primarily used for eye protection for the person wearing it. At this time, it is not known what level of protection a face shield provides to people nearby from the spray of respiratory droplets from the wearer. There is currently not enough evidence to support the effectiveness of face shields for source control. Therefore, **CDC does not currently recommend use of face shields as a substitute for masks.**
- iii. However, wearing a mask may not be feasible in every situation for some people for example, people who are deaf or hard of hearing—or those who care for or interact with a person who is hearing impaired. Here are some considerations for individuals who must wear a face shield instead of a mask:
- iv. Although evidence on face shields is limited, the available data suggest that the following face shields may provide better source control than others:
 - v. Face shields that wrap around the sides of the wearer’s face and extend below the chin and hooded face shields.
 - vi. Face shield wearers will be instructed to wash their hands before and after removing the face shield and avoid touching their eyes, nose and mouth when removing it.
 - vii. Disposable face shields should only be worn for a single use and disposed of according to manufacturer instructions.
- viii. Reusable face shields, **which is the type utilized in this court**, shall be cleaned and disinfected after each use according to manufacturer instructions or by following CDC face shield cleaning instructions: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/eye-protection.html>.”
- ix. The court has obtained face shields that comply with the above information from the CDC. In the event a juror is unwilling to wear a face shield instead of a face mask, the court may either allow the juror to wear a mask or may excuse the person from serving on the jury.
- x. There is sufficient funding for the court to acquire face masks that extend below the chin, and it has already done so. Face shields will be provided by the court.

- L. The defendant will wear a face shield; the victim and other courtroom observers/participants will wear face masks and will be socially distanced;
- M. Witnesses will wear face shields; the witness box is six feet from the counsel tables and a minimum of six feet from the location of any juror;
- N. Counsel and litigants will be permitted to use their common sense in utilizing methods of private communication, reminded that health concerns should be uppermost in their minds; **the court expects counsel to maintain social distancing with co-counsel and his or her client at all times;**
- O. The courtroom is not well-equipped for the digital presentation of exhibits on a screen; documentary exhibits and jury instructions will be in sufficient number so that each juror will have their own copy; exhibits which cannot be duplicated will be displayed on a table so the jurors can view the exhibits individually; gloves will be provided so that each juror will be permitted to pick up and examine the exhibit which will then be sanitized for the next juror; the court will instruct the jurors in the proper use of gloves, in accordance with CDC and VDH guidelines (see III.10, above);
- P. There will be a 15-minute break every two hours to sanitize all surfaces in the courtroom, including without limitation, door handles, tables, chairs, etc., and for all court participants to wash their hands; jurors will be permitted to socially distance in the covered portico during this period; court personnel will sanitize around their space - - defense counsel will have canisters of sanitizer sheets at counsel table as will the Commonwealth; the same goes for the bench, etc.; the bailiffs and other court personnel will be responsible for sanitizing the jurors' seats and the witness box (which will also be sanitized between witnesses); jurors will leave their face shields at their seats when taking breaks so that the shields can be sanitized by court personnel; all door knobs and handles and other high touch throughout the courthouse will be sanitized during each break and daily;
- Q. During bathroom breaks, bathrooms will be monitored to ensure social distancing; as a consequence, breaks are likely to take longer; signs will be posted above sinks containing guidance on techniques for proper hand washing (see III.9, above); social distancing will be maintained by deputies in all hallways; the stairs will be monitored to ensure one-way traffic at all times; persons will be held at the top and bottom of the stairs and released only when a group from the opposite direction has arrived and cleared the area; the elevator will only be used when boxes cannot be conveniently carried up the stairs and will be occupied at such times by only one person; **all bathrooms will be sanitized daily;**
- R. Jurors will be permitted to leave the courthouse during lunch breaks, during which the courtroom will be sanitized; when jurors return they will be asked the COVID questions and have their temperatures taken before being permitted to return to the courtroom; deputies will ensure that there is only one direction of travel on the staircase, and will ensure social distancing;
- S. At the end of each day the jurors will leave their face shields at their seats and will don face masks to travel through and exit the courthouse; the face shields will be sanitized, as will the courtroom, prior to the commencement of the next day's proceedings;

- T. The jury will be moved to the jury room for objections and matters to be addressed outside the presence of the jury; the jury room is large enough to ensure social distancing;
- U. Witnesses will arrive on a staggered schedule and will go through the same screening as the prospective jurors; if they arrive when other witnesses are waiting to testify, they will be socially distanced in appropriately separated witness rooms, of which there are several located throughout the second floor; they will also be provided face masks which they will exchange for face shields when called to testify; when their testimony is concluded their face shields will be collected, sanitized, and ready for other witnesses; retained witnesses will be relocated in the witness rooms previously identified; **if a person responding “yes” to any of the “High Risk Questions” or “Screening Questions” is a necessary party or witness, the court will make accommodations for that person through Polycom, Webex or continuances so as to not expose jurors and other participants;**
- V. Jurors will deliberate in the jury room (social distancing required); they will be required to remain in face shields, however, they will be permitted to exchange those shields for face masks, if they prefer; jury questions will be delivered to the judge by an appropriately gloved and masked bailiff; if deliberations are lengthy, persons will be permitted to leave the courthouse, but will be screened upon their return;
- W. Jurors will not be sequestered, absent good cause;
- X. All deputies involved in moving prisoners/defendants will be masked and gloved at all times; they will also be provided face shields which they may wear, in addition to the masks, at their option;
- Y. All public surfaces throughout the courthouse likely to be touched will be sanitized daily.

VI. Anticipating Problems

- A. If a person involved in the trial develops symptoms of COVID or feels ill, that person should contact the Clerk of Court at (540) 948-6888, the response will depend on the individual:
 - 1. If it is a party (criminal defendant, plaintiff/defendant) or the judge, the court will recess to determine if the individual tests positive; if so, the court will determine if the trial may be continued for a period to assess whether it can be resumed; if not, a mistrial/nonsuit may be declared;
 - 2. If it is one of the attorneys, the case may continue with the remaining attorney representing that side;
 - 3. If it is a juror, that juror will be dismissed and the court will consider whether or not the case will proceed with the several alternates chosen for such an occasion; all personnel who came into contact with that juror will have their temperatures taken three times per day;
 - 4. If it is another person involved (bailiff, clerk, court reporter, etc.), the case will continue with a replacement;
 - 5. In any event, the case will briefly recess for a comprehensive cleaning of the courtroom and the courthouse (to take likely up to a day), the Health Department will

- be contacted so that it may initiate its protocol; the clerk will inform the jurors, litigants and the public of the cause and period of delay;
6. HIPAA and other federal and state laws and regulations will be complied with regarding dissemination of Protected Health Information;
 7. In the event the courthouse needs to be closed for any period of time, the court will consult with the Clerk of Court, the Commonwealth's Attorney, the Juvenile and Domestic Relations and General District Court judges, and the Sheriff regarding the method and manner of reopening the courthouse to the public;
 8. Vehicles used to transport prisoners will be sanitized before and after each trip;
 9. In an attempt to anticipate problems the court will conduct a telephonic pre-trial conference with counsel and relevant stakeholders one week in advance of trial to explain expectations, special safety and sanitizing procedures, handling of witnesses and exhibits, foot traffic, scheduling and arrival of the *venire*, and walking through the trial step by step.

VII. Conclusion

It is clear that many health risks can be minimized, but they cannot be eliminated. There are other factors at play, such as the defendant's right to a speedy trial and the right to a trial by a jury of peers, as well as the right to a public trial. This memorandum attempts to address the health concerns which the court is most likely to confront when resuming jury trials, but I recognize that the plan and protocols set forth herein are subject to modification as the court becomes more adept at handling this extraordinary emergency.

Please let me know if I can provide any additional information as you consider this submission.

cc: Karl Hade R. Hade (khade@vacourts.gov)
Edward M. Macon (emacon@vacourts.gov)
Timothy K. Sanner, Chief Judge, 16th Judicial Circuit (tsanner@vacourts.gov)